Teo Kian Chun and other appeals v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-05(M)-281–05 OF 2018, J-05(M)-282–05 OF 2018, J-05(SH)-286–05 OF 2018 AND J-05(SH)-287–05 OF 2018
KAMARDIN HASHIM, MOHAMAD ZABIDIN AND HAS ZANAH MEHAT JJCA
27 JULY 2020

Criminal Procedure — Appeal — Drug trafficking — Presumption of possession and trafficking under Dangerous Drugs Act 1952 ('the DDA') — Whether learned trial judge erred when double presumptions under ss 37(d) & 37(da) — Whether learned trial judge erred when His Lordship found custody, control, knowledge and possession proven despite break in the chain of evidence and prosecution suppressed material evidence — Whether learned trial judge erred when finding appellants' defence was afterthought — Dangerous Drugs Act 1952 ss 39B & 34

On 24 May 2016 at around 4.15pm, the second appellant was seen bringing a black trolley bag with the brand 'Lotus Master' and a white paper bag heading for the check-in counter for departure. At the time, the first appellant was with him but was not carrying anything. The second appellant placed the said bag into the scanning machine on the instructions of SP5 who was on duty there at the time. SP5 discovered that there was a suspicious looking image in the bag and asked both the appellants what was in the bag. The first sppellant replied that it was only a hamper. Not satisfied with the reply from the first appellant, SP5 instructed that the said bag be opened. As both the appellants proceeded out of the Aero Mall, they were followed by SP5 who also sought the assistance of SP6 and SP8 to arrest the appellants. SP5, SP6, SP7, SP8 and SP9 who were involved in the arrest of the appellants testified that the first appellant was holding a trolley bag P27 while the second appellant was carrying a paper bag brand 'Emporio Armani' and a carry bag brand 'Mona Lisa'. An examination of the said trolley bag P27 revealed the presence of a number of pills which upon subsequent analysis by SP3, the chemist, was found to contain methylenedioxymethamphetamine ('the MDMA') weighing 227.19g and 9,960 pills containing poison fenazepam weighing 1,829.61g. The learned trial judge found the prosecution had established a prima facie case for the second amended charge against both the appellants. The learned trial judge ordered both the appellants to enter their defence. During defence stage, both appellants testified by way of witness statements. Both appellants contended that the bag was in fact belongs to a Chinese woman and were instructed to sign some documents without knowing what those documents were or having those documents explained to them. They further contended that the CCTV

recording shown in court had not covered a 'blind spot' which would have shown the presence of the Chinese woman together with them and an auxiliary policeman. At the conclusion of the trial, the learned trial judge found both appellants' defenses had failed to rebut on a balance of probabilities, the statutory presumption of possession under s 37(d) and also the presumption of trafficking under s 37(da) of the Act. The learned trial judge found both the appellants were guilty of the first amended charge, convicted both the appellants and sentenced them to death. Regarding the second amended charge, the learned trial judge also found both appellants failed to rebut on balance of probabilities, the presumption of possession and knowledge under s 30(4) of the Poison Act. Both appellants were found guilty and sentence them to one year imprisonment to run from the date of their arrest. Both the appellants filed separate appeal for the separate charges. The appellants appeals are on three grounds as follows: (a) The learned trial judge had erred when he invoked double presumptions under s 37(d) and 37(da) at the same time; (b) the learned trial judge had erred when His Lordship found custody, control, knowledge and possession had been proven despite there was break in the chain of evidence and the prosecution had suppressed material evidence; and (c) the learned trial judge had erred when finding the appellants' defence was an afterthought.

Held, allowing the appeal:

(1) It was obvious that the learned trial judge used double presumptions to order both appellants to enter their defence. After hearing the defences, His Lordships again relied on double presumptions to convict both the appellants. The court was of the view that the use of double presumptions gave rise to a real risk that both the appellants may be convicted of drug trafficking in circumstances where reasonable doubts remain. Thus the court found this to be a serious misdirection on the part of the trial judge which warranted an appellate intervention (see para 40).

(2) The court found there was no evidence to prove both the appellants had acted in concert to traffic the impugned drugs as defined under s 2 of the Act to warrant the calling of their defence for a charge of trafficking. Therefore, the court was of the considered view, with respect to the trial judge, both the appellants should not have been called to enter their defence for the charge of trafficking. The court found the conviction of both the appellants for trafficking is not safe. On this ground alone the conviction and sentence of both the appellants for the offence of trafficking had to be set aside (see para 44).

(3) It was further argued that the learned trial judge had erred when His Lordship found custody, control and possession was established when the evidence showed there was a break in the chain of evidence pertaining to the drug exhibit as well as the poison. The court found no reason to

interfere with His Lordship's finding on the issue of chain of evidence pertaining to the exhibits tendered. The available evidence support the finding of the learned trial judge that there was no break in the chain of evidence of the exhibits. All the relevant witnesses had identified the exhibits based on the marking found on them (see paras 52–53).

(4) The court was of the considered view sufficient notice had been given to enable the investigating officer to investigate the veracity of the defence. In fact, it was quite simple for the investigating officer to do so. He had in fact, already partially done so by obtaining the CCTV recording. Unfortunately, for reasons only known to him, he had deemed it fit to leave out the crucial moments in the CCTV recording which could have either rebut or support the defence. The full duration of the CCTV recording would reveal that the Chinese woman either really existed or merely the appellants' creation. The defence's version could not therefore be justifiably characterised or dismissed as an afterthought (see para 58).

[Bahasa Malaysia summary

Pada 24 Mei 2016 sekitar jam 4.15 petang, perayu kedua dilihat membawa beg troli hitam berjenama 'Lotus Master' dan beg kertas putih menuju ke kaunter daftar masuk untuk berlepas. Pada masa tersebut, perayu pertama bersama beliau tetapi tidak membawa apa-apa. Perayu kedua meletakkan beg tersebut ke dalam mesin pengimbas atas arahan SP5 yang bertugas di situ pada masa tersebut. SP5 mendapati terdapat imbasan yang mencurigakan di dalam beg tersebut dan bertanya kepada kedua-dua perayu kandungan beg tersebut. Perayu pertama pertama menjawab bahawa ianya hanyalah hamper. Tidak berpuas hati dengan jawapan dari perayu pertama, SP5 mengarahkan agar beg tersebut dibuka. Ketika kedua-dua perayu keluar dari Aero Mall, mereka diikuti oleh SP5 yang juga meminta bantuan SP6 dan SP8 untuk menahan perayu. SP5, SP6, SP7, SP8 dan SP9 yang terlibat dalam penahanan perayu memberikan keterangan bahawa perayu pertama membawa beg troli P27 sementara perayu kedua membawa beg kertas berjenama 'Emporio Armani' dan membawa beg berjenama 'Mona Lisa'. Pemeriksaan pada beg troli P27 tersebut menunjukkan kewujudan sebilangan pil yang setelah dianalisa oleh SP3, ahli kimia tersebut, mendapati mengandungi methylenedioxymethamphetamine ('MDMA tersebut') seberat 227.19g dan 9,960 pil mengandungi racun fenazepam seberat 1,829.61g. Hakim perbicaraan yang bijaksana membuat dapatan bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap pertuduhan pindaan kedua terhadap kedua-dua perayu. Hakim perbicaraan yang bijaksana memerintahkan kedua-dua perayu untuk membela diri. Pada peringkat pembelaan, kedua-dua perayu memberikan keterangan melalui penyata saksi. Kedua-dua perayu berpendapat bahawa beg tersebut sebenarnya milik seorang wanita Cina dan mereka diarahkan untuk menandatangani beberapa dokumen tanpa mengetahui kandungan dokumen tersebut atau dokumen tersebut dijelaskan

kepada mereka. Mereka selanjutnya berpendapat bahawa rakaman CCTV yang disiarkan di mahkamah tidak merangkumi 'titik buta' yang mana akan menunjukkan kehadiran seorang wanita Cina itu bersama mereka dan seorang polis bantuan. Pada akhir perbicaraan, hakim perbicaraan yang bijaksana mendapati kedua-dua pembelaan perayu gagal menyangkal imbangan kebarangkalian, anggapan undang-undang terhadap pemilikan di bawah s 37(d) dan juga anggapan pengedaran di bawah s 37(da) Akta tersebut. Hakim perbicaraan yang bijaksana mendapati kedua-dua perayu bersalah atas pertuduhan pindaan pertama, mensabitkan kedua-dua perayu dan menjatuhkan hukuman mati. Pada pertuduhan pindaan kedua, hakim perbicaraan yang bijaksana juga mendapati kedua-dua perayu gagal menyangkal imbangan kebarangkalian, anggapan pemilikan dan pengetahuan berdasarkan s 30(4) Akta Racun. Kedua-dua perayu didapati bersalah dan menjatuhkan hukuman penjara satu tahun dari tarikh tangkapan mereka. Kedua-dua perayu mengemukakan rayuan berasingan untuk pertuduhan berasingan. Rayuan perayu adalah berdasarkan tiga alasan seperti berikut: (a) Hakim perbicaraan yang bijaksana telah terkhilaf apabila mengguna pakai anggapan berganda di bawah ss 37(d) dan 37(da) pada masa yang sama; (b) hakim perbicaraan yang bijaksana telah terkhilaf apabila beliau membuat dapatan bahawa jagaan, kawalan, pengetahuan dan milikan telah dibuktikan walaupun terdapat pemutusan dalam rangkaian bukti dan pihak pendakwaan telah menyembunyikan bukti yang material; dan (c) hakim perbicaraan yang bijaksana telah terkhilaf apabila membuat dapatan bahawa pembelaan perayu adalah suatu pemikiran semula.

Diputuskan, membenarkan rayuan:

(1) Ianya adalah jelas bahawa hakim perbicaraan yang bijaksana telah mengguna pakai anggapan berganda untuk memberikan perintah supaya kedua-dua perayu membela diri. Setelah mendengar pembelaan, Yang Arif sekali lagi bergantung kepada anggapan berganda untuk mensabitkan kedua-dua perayu. Mahkamah berpendapat bahawa penggunaan anggapan berganda menimbulkan risiko nyata bahawa kedua-dua perayu boleh disabitkan dengan kesalahan mengedar dadah dalam keadaan di mana keraguan yang munasabah masih kekal. Oleh itu, mahkamah mendapati bahawa ini adalah kekhilafan yang serius dari hakim perbicaraan yang membenarkan campur tangan mahkamah rayuan (lihat perenggan 40).

(2) Mahkamah mendapati tidak ada keterangan untuk membuktikan kedua-dua perayu telah bertindak secara bersama untuk mengedar dadah tersebut seperti yang didefinisikan di bawah s 2 Akta tersebut dalam membenarkan mereka untuk membela diri terhadap pertuduhan pengedaran. Oleh itu, mahkamah dalam dapatannya, terhadap hakim perbicaraan, kedua-dua perayu seharusnya tidak dipanggil untuk membela diri atas pertuduhan pengedaran. Mahkamah mendapati

A sabitan kedua-dua perayu terhadap pengedaran tidak dapat dikekalkan. Atas alasan ini sahaja, sabitan dan hukuman kedua-dua perayu atas kesalahan pengedaran seharusnya diketepikan (lihat perenggan 44).

(3) Ianya dihujahkan dengan lebih lanjut bahawa hakim perbicaraan yang B bijaksana telah terkhilaf apabila Yang Arif mendapati jagaan, kawalan dan milikan telah dibuktikan apabila bukti menunjukkan terdapat pemutusan dalam rantaian bukti yang berkaitan dengan ekshibit dadah dan juga racun tersebut. Mahkamah tidak mempunyai alasan untuk mengganggu dapatan Yang Arif berkenaan isu rantaian bukti yang C berkaitan dengan ekshibit yang telah ditanda. Keterangan yang ada menyokong dapaptan hakim perbicaraan yang bijaksana bahawa tidak ada pemutusan dalam rantaian bukti setiap ekshibit. Kesemua saksi yang berkaitan telah membuat pengecaman ekshibit berdasarkan tanda yang terdapat padanya (lihat perenggan 52–53).

D (4) Mahkamah berpendapat bahawa notis yang mencukupi telah diberikan untuk membolehkan pegawai penyiasat menyiasat kebenaran pada pembelaan. Sebenarnya, cukup mudah bagi pegawai penyiasat untuk melakukannya. Beliau sebenarnya telah melakukan sebahagiannya dengan mendapatkan rakaman CCTV. Malangnya, pada alasan yang E hanya diketahui olehnya, beliau menganggap wajar untuk meninggalkan detik-detik penting dalam rakaman CCTV yang mana sama ada boleh menyangkal atau menyokong pembelaan. Durasi penuh rakaman CCTV tersebut akan menunjukkan bahawa wanita Cina tersebut benar-benar wujud atau hanya ciptaan perayu. Versi pembelaan dengan F itu tidak dapat dijustifikasi secara gambaran atau ditolak sebagai pemikiran semula (lihat perenggan 58).]

Cases referred to

G *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209, FC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)
Chan King Yu v PP [2009] 1 MLJ 457; [2009] 1 CLJ 601, FC (refd)
Muhamad bin Hassan v PP [1998] 2 MLJ 273, FC (refd)

H **Legislation referred to**

Dangerous Drugs Act 1952 ss 2, 37(d), (da), (da)(xvii), 37A
Federal Constitution arts 5(1), 8(1)
Poisons Act 1952 s 30(4)

I **Appeal from:** Criminal Trial No 45A-43–12 of 2016 (High Court, Johor Bahru)

Gopal Sri Ram (Hisyam Teh Poh Teik, Yasmeen Soh and Raveena Kaur Vessy with him) (Teh Poh Teik & Co) in Criminal Case Nos J-05(M)-281–05 of 2018 and

J-05(SH)-286–05 of 2018 for the appellant.
KL Chee (KL Chee & Co) in Criminal Case Nos J-05(M)-282–05 of 2018 and J-05(SH)-287–05 of 2018 for the appellant.
Mangaiarkarasi Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Zabidin JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant in Criminal Appeal Nos J-05(M)-281–05 of 2018 and J-05(SH)-286–05 of 2018 was charged in the High Court together with the appellant in Criminal Appeal Nos J-05(M)-282–05 of 2018 and J-05(SH)-287–05 of 2018. Both were charged with two charges and the amended charges against them reads:

1st Amended Charge.

> Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 4:15 petang di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai, dalam Daerah Johor Bahru, di dalam Negeri Johor telah mengedar dadah berbahaya iaitu Methylenedioxymethamphetamine (MDMA) seberat 227.19 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

2nd Amended Charge.

> Bahawa kamu bersama-sama pada 24 Mei 2016, lebih kurang jam 4:15 petang di pejabat Unit Khas Pemeriksaan Penumpang, Jabatan Kastam Diraja Malaysia, Balai Ketibaan Lapangan Terbang Antarabangsa Senai, dalam Daerah Johor Bahru di dalam Negeri Johor, telah didapati dalam milikan kamu racun iaitu Fenazepam seberat 1829.61 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 30(3) Akta Racun 1952 (Disemak 1989) dan dihukum di bawah Seksyen 30(5) Akta yang sama dibaca bersama-sama Seksyen 34 Kanun Keseksaan.

[2] At the conclusion of the trial, the learned High Court judge (learned trial judge) found both appellants guilty for both the charges. Both appellants were sentenced to death for the first amended charge. As for the second amended charge, both were sentenced to one year imprisonment. Both appellants filed separate appeal for the separate charges. Hence these four appeals before us. On 29 July 2019, we heard all four appeals together and at the end of which we allowed the appeals and set aside the orders made by the learned trial judge. We now give our reasons.

[3] For convenience, Teo Kian Chun will be referred to as the first appellant and Tan Hark Liang as the second appellant.

THE PROSECUTION'S CASE

[4] The prosecution's case as narrated by the learned trial judge was that on 24 May 2016 at around 4.15pm, the second appellant was seen bringing a black trolley bag with the brand 'Lotus Master' and a white paper bag heading for the check-in counter for departure.

[5] At the time, the first appellant was with him but was not carrying anything. The second appellant placed the said bag into the scanning machine on the instructions of SP5 who was on duty there at the time.

[6] SP5 discovered that there was a suspicious looking image in the bag and asked both the appellants what was in the bag. The first appellant replied that it was only a hamper.

[7] Not satisfied with the reply from the first appellant, SP5 instructed that the said bag be opened. At that time the first appellant quickly took the said bag and hastily proceeded in the direction heading out of the Aero Mall. At the same time, the second appellant took the white paper bag and also proceeded hastily out of the Aero Mall.

[8] As both the appellants proceeded out of the Aero Mall, they were followed by SP5 who also sought the assistance of SP6 and SP8 to arrest the appellants. At that time, SP9 and his colleague from the Customs Department, SP7, also happened to be present and together with the auxiliary police, detained both appellants together with the said bag (P27).

[9] SP5, SP6, SP7, SP8 and SP9 who were involved in the arrest of the appellants testified that the first appellant was holding a trolley bag P27 while the second appellant was carrying a paper bag brand 'Emporio Armani' and a carry bag brand 'Mona Lisa'. Both appellants were brought to the Branch Examination Office 'Pejabat Cawangan Pemeriksaan' at the Senai International Airport.

[10] An examination of the said trolley bag P27 revealed the presence of a number of pills which upon subsequent analysis by SP3, the chemist, was found to contain methylenedioxymethamphetamine (MDMA) weighing 227.19g and 9,960 pills containing poison fenazepam weighing 1,829.61g.

FINDING OF THE TRIAL JUDGE

[11] At the close of the prosecution's case, the learned trial judge found both the appellants were in custody and control of the said bag. The learned trial judge then invoked presumption under s 37(d) of the Dangerous Drugs Act 1952 ('the Act') to impute knowledge and possession of the drug in the said bag which form the subject matter of the first amended charge.

[12] Since the weight of the drug seized was more than 50g, the learned trial judge then invoked s 37(da) of the Act and found the prosecution had established a prima facie case for the charge of trafficking against both the appellants. The learned trial judge ordered both the appellants to enter their defence.

[13] Regarding the second amended charge, the learned trial judge found since both the appellants were in custody and control of the said bag, the statutory presumption of possession and knowledge under s 30(4) of the Poisons Act 1952 applies ('the Poisons Act'). Thus, the learned trial judge found the prosecution had established a prima facie case for the second amended charge against both the appellants. The learned trial judge ordered both the appellants to enter their defence.

DEFENCE

[14] During defence stage, both appellants testified by way of witness statements. The first appellant testified that second appellant called him on 23 May 2016 by phone and said that he wanted to meet him. When the second appellant arrived at Johor from Kuching on 24 May 2016, they met up at a Chinese Restaurant in Johor Jaya at about 1pm. Their conversation centered on a few things and the second appellant requested the help of the first appellant to find a job for him.

[15] After the meal, the second appellant asked the first appellant to send him to Senai International Airport. The second appellant told the first appellant that he wanted to fly back to Kuching, Sarawak that very day itself. The first appellant then sent the second appellant to Senai International Airport in the first appellant's car. The first and second appellant arrived at Senai International Airport at about 4pm and the first appellant parked his car by the side of the road in front of the main entrance to the terminal.

[16] The first appellant then alighted from the car and accompanied the second appellant into the terminal building. The first appellant said that he saw the second appellant carrying three bags — one black trolley bag, one shoulder bag and one white paper bag. The first appellant did not carry any bags.

[17] Only at that time did the second appellant inform the first appellant that he had not bought a flight ticket yet. The first appellant was annoyed with the second appellant for not informing him of this earlier as he had parked his car by the side of the road and was afraid of receiving a summons.

[18] The second appellant then proceeded to the Air Asia ticket counter. At the counter, the person manning the counter informed the second appellant that tickets to Kuching, Sarawak were sold out. However, she suggested to the second appellant to go to the check-in counter and to register his name on the waiting list there if he still wanted to go back on that day. During this period, all three bags were in the care of the second appellant.

[19] The second appellant then proceeded to the Air Asia check-in counter to register his name on the waiting list while the first appellant followed him. To get to the check-in counter, the second appellant had to pass through a baggage scanner. As the second appellant did not have a ticket yet and only wanted to register his name on the waiting list, he walked right past the baggage scanner without scanning his bags. An auxiliary police officer then asked the second appellant where he wanted to go.

[20] Meanwhile, an auxiliary police officer manning the baggage scanner stopped the second appellant and instructed him to turn back and place his black trolley bag into the baggage scanner to be scanned. The second appellant without hesitation immediately turned back and placed his black trolley bag into the baggage scanner as instructed. After doing so, the second appellant then waited in line to pass through the baggage scanner area. The first appellant was beside the second appellant at that time.

[21] The second appellant had to wait in line because the line was held up by a Chinese woman in front of him. According to both the first and second appellants, the hold-up was due to an auxiliary policeman inspecting a black bag belonging to the Chinese woman. The said Chinese woman had with her two black bags.

[22] Both appellants said that while the auxiliary policeman was inspecting the Chinese woman's bag, the second appellant's black bag was still inside the baggage scanner. The bag had not moved as the conveyor belt was stopped while the auxiliary policeman inspected the Chinese woman's bag.

[23] The conveyor belt started to move again after two Malay women behind the first and second appellants placed their bags inside the baggage scanner machine. The second appellant then received a phone call. At that time, the first appellant saw two black bags make their way out of the baggage scanner. According to the first appellant, when the two black bags came out of the

baggage scanner, the Chinese woman was still at the front of the line, followed by the first appellant and the second appellant and finally the two Malay women.

[24] According to the first appellant, the line in front of the baggage scanner was a bit chaotic. When a black bag made it out from the baggage scanner, the first appellant saw that the second appellant was on the phone. The first appellant also saw the second appellant signal with his hands to him to help him with his bag as the second appellant was on the phone. The first appellant without hesitation then took a black trolley bag that had made its way out of the baggage scanner.

[25] The first appellant had spontaneously taken the black trolley bag, not realizing that the black trolley bag was not the one belonging to the second appellant but to the Chinese woman instead.

[26] Immediately after taking the black trolley bag, the first appellant turned around and headed straight back to his car followed by the second appellant. The first appellant was understandably apprehensive as he had parked his car by the side of the road in front of the main entrance to the terminal as he had honestly believed that he would not take long to send the second appellant off.

[27] The first appellant honestly believed that he would park the car, accompany the second appellant to check in the latter's bags, send him off to the departure gate, and return back to his car and go home. Instead, because the second appellant had not purchased a ticket, it took much, much longer than he had anticipated. The first appellant was very worried that he might be slapped with a hefty fine because he had parked his vehicle in a no parking zone.

[28] The first appellant also stated that he had held the trolley bag for a mere few seconds only before he handed it over to the second appellant while they were walking back to the car. The second appellant confirmed the first appellant's version in this respect.

[29] Not long after, both appellants stated that they saw some Customs officers and also auxiliary policemen approaching them and instructing them to cooperate with them. The first and second appellant denied that there was a struggle when the officers tried to apprehend them. Both appellants also denied that they had attempted to flee.

[30] According to both appellants, they were then brought to an inspection room by the customs officer who had detained them. In that room, a customs

officer proceeded to open and ransack the black trolley bag which the second appellant had been pulling. Both denied that one of them had opened the black trolley bag.

[31] After a few minutes, a customs officer instructed both appellants to be taken out of the inspection room. The second appellant then wanted to go to the men's room and both appellants were brought there. Both appellants were brought back into the inspection room after they had returned from the men's room. PW10 then inspected the bag and found drugs. The second appellant tried to tell the arresting officer SP5 that they had mistakenly took the bag which belonged to the Chinese woman but SP5 took no action.

[32] Both appellants also stated that during their interrogation and also when their cautioned statements were recorded, no Mandarin translator was present to translate for them. Hence, they were not able to understand the questions posed to them by the customs officer.

[33] Instead, both appellants were instructed to sign some documents without knowing what those documents were or having those documents explained to them. In their worried and confused state of mind, both appellant signed the documents as instructed.

[34] Both appellants contended that the CCTV recording shown in court had not covered a 'blind spot' which would have shown the presence of the Chinese woman together with them and an auxiliary policeman. A CCTV recording from the opposite direction would have revealed what actually happened.

FINDING OF THE TRIAL JUDGE

[35] At the conclusion of the trial, the learned trial judge found both appellants' defenses had failed to rebut on a balance of probabilities, the statutory presumption of possession under s 37(d) and also the presumption of trafficking under s 37(da) of the Act (para 149 of ground of judgement at p 59 appeal record volume 1). Learned trial judge found both the appellants were guilty of the first amended charge, convicted both the appellants and sentenced them to death.

[36] Regarding the second amended charge, the learned trial judge also found both appellants failed to rebut on balance of probabilities, the presumption of possession and knowledge under s 30(4) of the Poisons Act 1952 (para 150 of ground of judgment at p 59 appeal record volume 2). Both appellants were found guilty and sentence them to one year imprisonment to run from the date of their arrest.

THE APPEAL

[37] Although the petition of appeal contains many grounds of appeal, before us, counsels for both the appellants canvassed only three broad grounds which may be summarised as follows:

(a) the learned trial judge had erred when he invoked both presumptions under s 37(d) and 37(da) at the same time;

(b) the learned trial judge had erred when His Lordship found custody, control, knowledge and possession had been proven despite there was break in the chain of evidence and the prosecution had suppressed material evidence; and

(c) the learned trial judge had erred when finding the appellants' defence was an afterthought.

FIRST ISSUE

[38] The issue of the usage of a presumption in conjunction with another presumption ('double presumptions') was in relation to the first amended charge. When making the finding that the prosecution had established a prima facie case for the first amended charge against both the appellants, His Lordship relied on s 37(d) to find both appellants had possession of the drugs. His Lordship said (see para 22 and 23 of ground of judgment at p 27 appeal record Vol 1:

> [22] The circumstances show that after SP5 asked for the said bag to be opened, the First Accused took the bag and promptly headed out of the Aero Mall followed by the Second Accused. Both accused then ran away before being apprehended. The circumstances show that they acted in concert. Based on the cited authorities above, I find therefore that the prosecution evidence had clearly proven as a fact that both the accused persons were in custody and control of the said bag.
>
> [23] Thus the deeming provision of the statutory presumption under section 37(d) of the DDA of possession and knowledge of the drugs in the said bag forming the subject matter of the First Charge arose against both the accused persons.

[39] After invoking s 37(d) to find both appellants had possession of the drug, His Lordship went on to invoke s 37(da)(xvii) to find both the appellants were trafficking in the said drug. His Lordship said (para 37 to 41 ground of judgment in appeal record Vol 1):

> [37] It has been proven that both accused persons were in possession of the dangerous drugs by virtue of the deeming provision in section 37(d) DDA.
>
> [38] As far as the first charge under s 39B(1)(a) of the DDA is concerned, the evidence of SP3, as has been seen, had proven that the dangerous drugs found in the said bag contained 3, 4 methylenedioxymethamphetamine (MDMA) weighing 227.19g nett.

A [39] ...

[40] I therefore find in light of the fact that the said substance 3, 4 methylenedioxymethamphetamine (MDMA) weighed 227.19g nett, the statutory presumption under section 37(da)(xvii) of the DDA has arisen against both accused persons in respect of the charge under s 39B(1)(a) DDA.

B [41] The burden upon the accused persons is to now rebut on a balance of probability such presumption. See *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89.

[40] Going through the ground of judgement, it is obvious that the learned C trial judge used both presumptions to order both appellants to enter their defence. After hearing the defences, His Lordships again relied on both presumptions to convict both the appellants. We are of the view that the use of double presumptions gave rise to a real risk that both the appellants may be convicted of drug trafficking in circumstances where reasonable doubts remain D (*Muhamad bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). Thus we find this to be a serious misdirection on the part of the trial judge which warrants an appellate intervention. However, to be fair to the learned trial judge, we feel it is important to mention here that His Lordship invoked both presumptions based on s 37A of the Act which allowed the usage of a presumption in E conjunction with another presumption before the Federal Court's ruled in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780, that s 37A to be unconstitutional for violating art 5(1) read with art 8(1) of the Federal Constitution.

F **[41]** After finding that the learned trial judge had erred in using double presumptions, both in calling for defence as well as convicting the appellants, we were left with the issue of whether there were sufficient evidence, strong enough, to support the conviction of both the appellants.

G **[42]** Reading the ground of judgment, would show that the learned trial judge found both appellants had custody and control of the said bag and had acted in concert based on the following reasons:

H (a) both appellants were together at the Senai International Airport and while the second appellant who was carrying the said bag at the time, placed it on the scanning machine, it was the first appellant who after replying to a question by SP5 that the contents of the bag was a hamper, immediately took the bag and headed out of the Aero Mall;

I (b) both appellant then exited out of the Aero Mall with haste and were promptly arrested. The evidence surrounding the above account came from SP5, SP6, SP7, which His Lordship found sufficient to prove that both the accused had custody and control of the said bag P27;

(c) when SP5 asked for the said bag to be opened, the first appellant took the bag and promptly headed out of the Aero Mall followed by the second appellant. Both appellants then ran off before being apprehended; and

(d) this, according to His Lordship, shows that both appellants acted in concert and thus His Lordship found that the prosecution evidence had proven that both the appellants were in custody and control of the said bag.

[43] Regarding the element of trafficking, since the learned trial judge invoked presumption under s 37(da)(xvii) to prove trafficking, there was no specific finding of facts made by His Lordship as to which of the Act under s 2 of the Act the appellants had committed to constitute trafficking.

[44] Going through the appeal record, we find there is no evidence to prove both the appellants had acted in concert to traffic the impugned drugs as defined under s 2 of the Act to warrant the calling of their defence for a charge of trafficking. Therefore, we are of the considered view, with respect to the trial judge, both the appellants should not have been called to enter their defence for the charge of trafficking. We found the conviction of both the appellants for trafficking is not safe. On this ground alone the conviction and sentence of both the appellants for the offence of trafficking has to be set aside.

SECOND ISSUE

[45] The second issue relates to the first as well as the second amended charge. It was submitted by both counsels for the appellants that the learned trial judge had erred when His Lordship found custody, control, knowledge and possession had been proven despite there was break in chain of evidence and the prosecution had suppressed material evidence.

[46] As we had alluded to earlier in this judgment, the learned trial judge found both the appellants had custody and control of the said bag. Thus, by invoking s 37(d) of the Act His Lordship found both appellants had possession of the impugned drug (subject matter of the first amended charge) and by invoking s 30(4) of the Poisons Act both appellants had possession of the impugned poison. His Lordship found both appellants had custody and control of the said bag based on: (a) both appellants were together at the Senai International Airport; (b) the second appellant who was carrying the said bag at the time, placed it on the scanning machine; (c) it was the first appellant who after replying to a question by SP5 that the contents of the bag was a hamper, immediately took the bag and headed out of the Aero Mall; and (d) both appellants were alleged to have exited out of the Aero Mall with haste. The evidence surrounding the above account came from SP5, SP6, SP7, and

supported by CCTV recording at the airport which His Lordship found sufficient to prove that both the appellants had custody and control of the said bag P27.

[47] However, it was the appellants' case that the said bag P27 did not belong to the appellants and they did not know its content. Their version of the event was that at the material time the second appellant with the help of the first appellant had passed bags belonging to the second appellant through the baggage scanning machine. At that point in time, there was a Chinese woman who was standing in front of them and was in conversation with the auxiliary police on duty at the scanner. The Chinese woman had two black bags with her. One of which was place in the scanner while the other was checked by the auxiliary police. While waiting for the luggage to come out of the scanner, the second appellant received a telephone call and walked away from the scanner. The second appellant, while on the phone, signaled the first appellant to take the bag from the scanner. As the two black bags came out of the scanner and only one bag belonged to the second appellant, the first appellant then picked up the black bag and proceeded towards the main entrance together with the second appellant. The first appellant was worried that he might have been issued with a traffic summons. While they were on their way to the first appellant's car, they noticed a few men running towards them. Both appellants were then arrested and taken into the Customs examination room. They did not resist the arrest and provided full cooperation at all times. The said black bag was then inspected and was found to contain suspected drugs. When the appellants realised they had picked up a wrong bag which probably belonged to the Chinese woman, they informed this to SP5 but SP5 did not take any action.

[48] It was also the appellants case that the whole incident would be revealed if the whole CCTV was produced in court instead of only for the duration of 2 minutes which was from 4.06pm to 4.08pm. This footage of the CCTV tendered by the prosecution merely showed the second appellant entering with a black trolley bag with him while the first appellant did not carry any bag. Both appellants were seen approaching the baggage scanner. Moments later the first appellant was seen carrying an identical black trolley bag heading back to the main entrance.

[49] Going through the notes of proceedings, it is apparent to us that right from the very start the importance of the CCTV footage was highlighted by the defence. Based on the letter by the Customs dated 27 May 2016 addressee to the Assistant and General Manager AVSEC and AFRS of the Senai Airport Terminal Services Sdn Bhd, the CCTV footage requested was for the duration within 3pm to 4.30pm on 24 May 2016 (see p 1045 Vol 3 appeal record). However, the footage played during the course of the trial was only for the

duration of two minutes which was from 4.06pm to 4.08pm. Upon receipt of the CD ('P38'), the Investigating Officer, Gerry Ho ('SP12') claimed to have considered the entire CCTV footage but only took into account two minutes of the video contending that there were no significant events that took place (see SP12's cross examination at p 743 Vol 2(3)).

[50] However, SP12 seemed to have contradicted himself during cross examination when he later agreed with the defence counsel that if the footage of the incidents which took place one minute earlier was obtained, the whole scenario would have been made clearer (see SP12's cross-examination at p 745 Vol 2 (3)). As such we are constrained to agree with the learned counsel for the appellants that if the full duration of the CCTV recording was produced, it may show there was indeed the Chinese woman who had placed her bags on the scanner. The omission of the relevant part of the CCTV footage showing the existence (or absence) of a Chinese woman placing a black bag at the scene is material and the omission prejudice the case for the defence. If CCTV was produced, it may show that the appellants had indeed mistakenly took a wrong bag (probably belonging to the Chinese woman) from the scanner and did not have any knowledge of its content. This would rebut any presumption of possession of the impugned drug as well as the poison.

[51] Furthermore, based on the evidence of SP5, SP6, SP7, SP8 and SP9, on which the learned trial judge relied on, both the appellants walked hastily towards the exit, resisted arrest and were uncooperative. And according to Gunasegaran, the Head of Security of Senai Airport ('SP11'), there were 43 cameras fixed at the main areas which include static cameras and rotating PTZ. In this circumstance, if the prosecution wishes the court to accept the prosecution's version that both accused were walking hastily towards the exit and resisted arrest, it would be reasonable to expect such CCTV footage showing the said arrest was tendered by the prosecution. Tendering the CCTV footage showing the arrest would have easily rebutted the defence version that there was no resistance or attempt to flee by both the appellants.

[52] It was further argued that the learned trial judge had erred when His Lordship found custody, control and possession was established when the evidence showed there was a break in the chain of evidence pertaining to the drug exhibit as well as the poison.

[53] Regarding this issue, the learned trial judge wrote in his ground:

> ... The evidence revealed that at all material times the accused persons as well as the exhibits were under the charge and care of SP7 and SP9 before they were handed over to SP10. This is evident from the testimony of SP10 who said that when he and Desmond Tero (SP2) arrived at the Pejabat Cawangan Pemeriksaan Penumpang (CPP) Senai he saw three bags including the said bag branded 'Lotus Master' ...

A ... I was satisfied therefore that there was no fatal break in the chain of exhibits ...

and we find no reason to interfere with His Lordship's finding on the issue of chain of evidence pertaining to the exhibits tendered. The available evidence support the finding of the learned trial judge that there was no break in the chain of evidence of the exhibits. All the relevant witnesses had identified the exhibits based on the marking found on them.

B

THIRD ISSUE

C **[54]** The third issue raised by the second appellant was regarding the alleged finding by the learned trial judge that the defence was an afterthought. We had scrutinized the ground of judgment written by the learned trial judge and found the learned trial judge had meticulously analyzed the defence put forward by the defence. However when came to the crux of the defence case, namely that they had taken a bag belonging to a Chinese woman by mistake, His Lordship said no '*Alcontara* notice' was given and concluded that the suggestion that the said bag belonged to the Chinese woman was conveniently created by the accused merely to exculpate themselves from the precarious position they found themselves in and the defence was an afterthought. His Lordship then went on to find the defence had failed to rebut on balance of probabilities, both the statutory presumptions under the Act. Hence both appellants were found guilty for the first amended charge. His Lordship also found on balance of probability the appellants failed to rebut presumption of possession under s 30(4) of the Poisons Act. Hence, both were found guilty for the second amended charge.

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[55] The '*Alcontara* notice' so described after the case which bears its name, is the furnishing of details in support of an accused's defence which is normally given in his or her cautioned statement. It must be borne in mind however, that this may or may not involve the actual tendering of the cautioned statement itself in evidence (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209).

G

[56] Once such a notice is given, investigation must be carried out on the disclosure given and the onus is then shifted to the prosecution to rebut the '*Alcontara* notice'. The shifting of the burden however, to the prosecution after the giving of the '*Alcontara* notice', as of necessity pre-supposes that sufficient particulars or reasonable details are furnished in order for the investigation officer to carry out a meaningful investigation.

H

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[57] Once such disclosure is made, it is then incumbent upon the prosecution to check the veracity of the facts disclosed and to negate the facts disclosed. It was held in *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457; [2009] 1 CLJ 601:

[84] As regards the material particulars relating to the existence of Man Chai which had been disclosed by the appellant in his cautioned statement exh D29 which was made on the day after his arrest, I am of the view that the police had all the time to check as to their veracity. The burden was on the prosecution to check whether the appellant's version of the facts as they appeared in the cautioned statement was true or false. The onus was upon the prosecution to disprove this important part of the appellant's version of facts. The appellant was under no duty to put to the investigation officer the aforesaid material particulars in view of their prior disclosure in the cautioned statement (see the case of *Alcontara Ambross Anthony v Public Prosecutor*).

[58] Reverting to this case, when the appellants informed SP5 that they had picked up a wrong bag which probably belong to the Chinese woman which was in the same que with them at the scanner machine, we are of the considered view sufficient notice had been given to enable the investigating officer to investigate the veracity of the defence. In fact, it was quite simple for the investigating officer to do so. He had in fact, already partially done so by obtaining the CCTV recording. Unfortunate, for reasons only known to him, he had deemed it fit to leave out the crucial moments in the CCTV recording which could have either rebut or support the defence. The full duration of the CCTV recording would reveal that the Chinese woman either really exist or merely the appellants' creation. The defence version cannot therefore be justifiably characterized or dismissed as an afterthought.

CONCLUSION

[59] Based on the reasons stated above, we find there are merits in the appeal by both the appellants. We find it is not safe to convict both the appellants for any of the charges. Hence, we unanimously allow the appeal by both the appellants. The convictions and sentences imposed by the learned High Court judge are set aside and we order both the appellants be acquitted and discharged from both charges.

Appeal allowed.

Reported by Nuzul Fitrie